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Supreme Court, U.S.
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In the

Supreme Court of the United States

SAM B. McQUEEN,

Petitioner,

v.

SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL, OFFICE OF OCEAN AND COASTAL RESOURCES MANAGEMENT (FORMERLY KNOWN AS SOUTH CAROLINA COASTAL COUNCIL),

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of South Carolina

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF SAM B. McQUEEN

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17 pp

QUESTION PRESENTED

Does the "Background Principles" inquiry into the nature of a Takings plaintiff's property interest allow a State to avoid the regulatory takings analysis prescribed by this Court and establish a per se exemption from the duty to pay just compensation whenever the regulated property is subject to the state's public trust doctrine?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS CURIAE 1

INTRODUCTION 2

ARGUMENT 4

I. WHETHER A STATE MAY APPLY THE "BACKGROUND PRINCIPLES" INQUIRY TO CREATE A CATEGORICAL EXEMPTION FROM THE DUTY TO PAY JUST COMPENSATION IS AN IMPORTANT QUESTION OF LAW ON WHICH THE LOWER COURTS ARE IN CONFLICT AND WHICH THIS COURT MUST ADDRESS TO ENSURE A FEDERAL RIGHT TO JUST COMPENSATION 4

A. The Decision Below Establishes a Per Se Public Trust Exception Incompatible with the Decisions of This Court and the Decisions of Lower Courts 5

1. The Lower Court's Identification of a "Background Principles" Exception Distorts This Court's Jurisprudence 5

2. The Lower Court's Decision Deepens a Conflict Concerning the Impact of the Public Trust Doctrine on the Right to Compensation 8

B. The Court Must Police the "Background Principles" Inquiry to Ensure That the Right to Just Compensation Does Not Wither in the States 9

CONCLUSION 12

TABLE OF AUTHORITIES

Page

Cases

Esplanade Properties, LLC v. City of Seattle,
307 F.3d 978 (9th Cir. 2002) 8

Hunziker v. State, 519 N.W.2d 367 (Iowa 1994) 10

Lucas v. South Carolina Coastal Council,
505 U.S. 1003 (1992) 1-2, 4-6, 10-11

Machipongo Land and Coal Co., Inc. v. Commonwealth
799 A.2d 751 (Pa. 2002) 10

McQueen v. South Carolina Coastal Council,
580 S.E.2d 116 (S.C. 2003) 10

McQueen v. South Carolina Coastal Council,
530 S.E.2d 628 (S.C. 2000) 2

McQueen v. South Carolina Coastal Council,
496 S.E.2d 643 (S.C. Ct. App. 1998) 2, 6

Nollan v. California Coastal Commission,
483 U.S. 825 (1987) 1

Orion Corp. v. State of Washington,
747 P.2d 1062 (Wash. 1987) 8-9

Palazzolo v. Rhode Island,
533 U.S. 606 (2001) 1, 2-3, 5-7

Palm Beach Isles Associates v. United States,
208 F.3d 1374 (Fed. Cir. 2000) 8-9

Penn Central Transp. Co. v. City of New York,
438 U.S. 104 (1978) 7

Phillips Petroleum Co. v. Mississippi,
484 U.S. 469 (1988) 7

TABLE OF AUTHORITIES—Continued

Page

Stevens v. City of Cannon Beach,
854 P.2d 449 (Or. 1993),
cert. denied 510 U.S. 1207 (1994) 10

Suitum v. Tahoe Regional Planning Agency,
520 U.S. 725 (1997) 1

Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302 (2002) ... 7, 12

Miscellaneous

Callies, David L. & Breemer, J. David, *Selected Legal and Policy Trends in Takings Law: Background Principles, Custom and Public Trust "Exceptions" and the (Mis)Use of Investment-Backed Expectations*,
36 Val. U. L. Rev. 339 (2002) 11

INTEREST OF AMICUS CURIAE

Pursuant to this Court's Rule 37.2, Pacific Legal Foundation respectfully submits this brief amicus curiae in support of Sam B. McQueen.[1]

For more than 30 years, Amicus Curiae Pacific Legal Foundation has been litigating in support of the rights of individuals to make reasonable use of their private property. Indeed, PLF attorneys have been before this Court on three occasions representing individuals whose right to use their property was unlawfully denied by government agencies. *See Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997); *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). PLF has also participated as amicus curiae in nearly every major real property takings case heard by the Court in the last two decades. PLF participated as amicus in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), a case which declared, in part, that courts should engage in an objective and factually-intensive "background principles" inquiry into property interests when the government claims that it is not required to pay compensation for a total regulatory taking.

PLF believes that its litigation experience and public policy perspective will provide an additional viewpoint on the issues presented in this case. PLF specifically argues that the Court should grant certiorari in this case because it raises an important and controversial constitutional question regarding whether a state may identify the public trust doctrine as a

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[1] Pursuant to this Court's Rule 37.2, all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

"background principle" of property law that, without further inquiry, absolves the state of its duty to compensate for a regulatory taking.

INTRODUCTION

In this case, the South Carolina Coastal Council (Council) refused to allow Sam B. McQueen (McQueen) to construct bulkheads to prevent the destruction of two parcels of land which he has held in private ownership since the early 1960's. Ultimately, McQueen wanted the bulkheads so he would be able to build a home. *See McQueen v. South Carolina Coastal Council*, 496 S.E.2d 643, 645 (S.C. Ct. App. 1998). The Council wanted no bulkheads so it could preserve the environmental benefits that it believes flow from the continuing inundation of McQueen's land. *Id.* Because the Council's actions prevented all economically viable use of his property, McQueen sued under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), alleging that the Council had effected an unconstitutional taking of private property without just compensation.

The South Carolina Court of Appeals agreed that the Council's actions had caused a taking by preventing all economically beneficial use of McQueen's property and that this result could not be justified as a manifestation of a preexisting title limitation. *McQueen*, 496 S.E.2d at 649. But in 2000, the state supreme court reversed, holding that there was no taking because McQueen was on notice of changes in the regulatory environment that rendered him without any reasonable investment-backed expectation of maintaining the physical integrity of his property. *McQueen v. South Carolina Coastal Council*, 530 S.E.2d 628 (S.C. 2000). On petition for certiorari, this Court remanded *McQueen* back to the South Carolina Supreme Court for reconsideration in light of *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), a decision

which foreclosed the "notice rule" as a bar to a takings claim. *Id.* at 626-30.

On remand from this Court, the South Carolina Supreme Court affirmed its previous decision of no taking, but on entirely new grounds. While accepting as uncontested the finding that McQueen had been deprived of all economically beneficial use, the court concluded that no compensation was due because a background principle of property law—the public trust doctrine—stripped McQueen of any right to compensation. The court did not consider the nature of the land use proscribed, the nature of the land use typical to McQueen's neighborhood, McQueen's expectations, or the extent to which the public trust doctrine has traditionally permitted certain private uses of land. In short, the court failed to consider whether McQueen had lost any private property interest before concluding that he had no right to compensation.

This Court should not mistake this case for a dispute over whether the South Carolina Supreme Court wrongly applied the state's public trust doctrine. This case is about a state court that has converted what is properly an analysis into whether government regulation has taken any private property interest—the "background principles" inquiry—into a vehicle for creating a new per se takings exception that provides a blanket escape from the Fifth Amendment command that governments compensate for depriving a landowner of all economically beneficial use of property.

ARGUMENT

I

WHETHER A STATE MAY APPLY THE "BACKGROUND PRINCIPLES" INQUIRY TO CREATE A CATEGORICAL EXEMPTION FROM THE DUTY TO PAY JUST COMPENSATION IS AN IMPORTANT QUESTION OF LAW ON WHICH THE LOWER COURTS ARE IN CONFLICT AND WHICH THIS COURT MUST ADDRESS TO ENSURE A FEDERAL RIGHT TO JUST COMPENSATION

In *Lucas*, this Court held that South Carolina could not avoid compensating for a deprivation of all economically beneficial use of land because the deprivation was intended to prevent a land use "harmful" to the public interest. *Lucas*, 505 U.S. at 1026. The Court explained that there was *no* escape from the duty to compensate when a private property owner is deprived of all economically beneficial use of land. Compensation is unnecessary only when "the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with." *Id* at 1027. That is, compensation is not constitutionally required when it is shown that government's regulatory actions did not harm a private use interest, but instead simply reinforced "preexisting limitations" on the claimant's title. *Id*. at 1028-29.

This Court has suggested that some title limitations might be found in "the restrictions that background principles of the State's law of property and nuisance already place upon land ownership." *Id*. at 1029. In this case, the court below transformed this "background principles" inquiry from an individualized inquiry into the nature of a landowner's title into a vehicle for creating a per se exception to takings liability. It has specifically concluded that the public trust doctrine, which grants the state a limited right to control lands and waters

influenced by the tides, operates as such an exception when found to encumber private property, without further inquiry. Because this construction conflicts with this Court's characterization of the "background principles" inquiry, the decisions of other lower courts, and threatens to erase "limits to the noncompensable exercise of the police power," *Lucas*, *Id.* at 1026, this Court should grant the petition for certiorari.

A. The Decision Below Establishes a Per Se Public Trust Exception Incompatible with the Decisions of This Court and the Decisions of Lower Courts

1. The Lower Court's Identification of a "Background Principles" Exception Distorts This Court's Jurisprudence

In *Lucas*, this Court outlined the scope of the "background principles" inquiry into the nature of a landowner's private (and thus compensable) use interests. It specifically noted that the inquiry will "ordinarily entail . . . analysis of" (1) "the degree of harm to public lands and resources, or adjacent private property posed by the claimant's proposed activities"; (2) "the social value of the claimant's activities and their suitability to the locality in question"; and (3) "the relative ease with which the alleged harm can be avoided through measures taken by the claimant and the government (or adjacent private landowners) alike." *Lucas*, 505 U.S. at 1030-31. In *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), the Court affirmed this framework, explaining that "[t]he determination whether an existing, general law can limit all economic use of property must turn on objective factors, such as *the nature of the land use* proscribed." *Id.* at 630 (emphasis added).

Moreover, in both *Lucas* and *Palazzolo*, the Court pointed to a rule of thumb that highlighted the need to fairly and equally apply the "background principles" exception. Specifically, a proscribed use of land will not normally implicate preexisting "background principles" restrictions unless that use of land has

been traditionally and consistently denied to similarly situated landowners. *Lucas*, 505 U.S. 1031 ("The fact that a particular use has long been engaged in by similarly situated owners ordinarily imports a lack of any common-law [background principles] prohibition . . . . So also does the fact that other landowners, similarly situated, are permitted to continue the use denied to the claimant."); *Palazzolo*, 533 U.S. at 630 ("A regulation or common-law rule cannot be a background principle for some owners but not for others.").

In concluding that the public trust doctrine permitted the state to deprive McQueen of all economically beneficial use of his land without just compensation, the court below radically departed from this Court's "background principles" framework. Absent from the lower court's analysis is any serious consideration of the fact that the land use denied to McQueen —placement of bulkheads for residential improvements—has been, and continues to be, engaged in by almost all landowners in McQueen's neighborhood. *See McQueen*, 496 S.E.2d at 599 ("McQueen's lots are among the few in the immediate vicinity which do not have bulkheads; his neighbors continue to use the existing retaining devices located on their properties and permanent dwellings have been constructed on most of the surrounding lots."). Nor is there consideration and discussion of the extent to which the public trust doctrine has coexisted with such private land use. Finally, there is no showing that improvement of land like McQueen's has been viewed as so inappropriate, so harmful, and the harm so inhospitable to mitigation, that no one in McQueen's circumstances has ever had a right to engage in such a use. For the lower court, the mere presence of tidewaters is, under the "background principle" of the public trust doctrine, enough to absolve the state of the duty to compensate for depriving McQueen of all economically beneficial use of property.

The court below has thus used the "background principles" inquiry into property interests to establish a per se public trust doctrine exception to takings liability. This is as unwarranted by general regulatory takings principles as it is by this Court's articulation of the "background principles" inquiry. This Court has, after all, declared that regulatory takings analysis is typically an "ad hoc factual inquir[y]," *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978), grounded in the fundamental principles of "fairness and justice." *Tahoe-Sierra*, 535 U.S. at 332; *Palazzolo*, 533 U.S. at 635 (O'Connor, J., concurring). ("Courts . . . must attend to those circumstances which are probative of what fairness requires in a given case."). Moreover, "[a]n important indicium of fairness," *id.* at 635, can normally be found in the determination of whether a landowner has reasonable expectations of using his land, given the "the nature and extent of permitted development . . . vis-a-vis the development sought by the claimant." *Id.* at 634.[2] Given these principles, lower courts are to avoid the "temptation to adopt what amount to *per se* rules in *either direction*." *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 321 (2002) (emphasis added).

South Carolina has unilaterally freed itself from these constitutional standards by creating a per se public trust exception under the rubric of the "background principles"

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[2] *Cf. Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 485 (1988). (O'Connor, Stevens, and Scalia, JJ., dissenting) (arguing against affirmation of a state decision extending the public trust to private land without compensation because it will surely "disrupt the settled expectations of landowners"). It is especially difficult to understand the lower court's failure to consider McQueen's expectations since the court was directed to reconsider *McQueen* in light of *Palazzolo*, a decision that contains considerable discussion of the relevance of landowner expectations. *See Palazzolo*, 533 U.S. at 626-30; *id.* at 632-36 (O'Connor, J., concurring).

inquiry. The Court should grant the Petition for Writ of Certiorari to reaffirm the "background principles" concept as a vehicle for fairly identifying property interests, not for creating broad exceptions to takings liability.

2. The Lower Court's Decision Deepens a Conflict Concerning the Impact of the Public Trust Doctrine on the Right to Compensation

While the Ninth Circuit Court of Appeals appears to agree with the South Carolina Supreme Court that the public trust doctrine supplies an automatic "background principles" exception to the duty to compensate, *see*, *e.g.*, *Esplanade Properties, LLC v. City of Seattle*, 307 F.3d 978 (9th Cir. 2002), other courts have adopted a more careful approach in keeping with this Court's jurisprudence. For instance, in *Orion Corp. v. State of Washington*, 747 P.2d 1062 (Wash. 1987), the Washington Supreme Court rejected an argument that "the public trust doctrine precludes Orion's takings claim in its entirety." Foreshadowing the "background principles" framework articulated in *Lucas*, the court concluded that the public trust's impact on the right to compensation could only be determined after an analysis of "whether Orion's property, burdened by the trust, is functionally and economically adaptable to some present, possible and reasonably profitable use." 747 P.2d at 1073.

Similarly, in *Palm Beach Isles Associates v. United States*, 208 F.3d 1374 (Fed. Cir. 2000), the Federal Circuit Court of Appeals refused to allow the government to claim a navigational servitude, the federal expression of the public trust doctrine, as a per se "background principles" exception. *Id.* at 1385. To avoid a taking, the government was required to show that its land use restrictions were specifically designed to enforce the government's preexisting property rights, rather than to limit the claimants' rights: "If . . . the Government cannot demonstrate that it denied the permit on navigational

grounds, then its defense under the navigational servitude fails." *Id.* at 1386.

The decision below articulates an understanding of the public trust doctrine and the "background principles" inquiry that is in direct conflict with the understanding of *Orion* and *Palm Beach Isles*. Unlike the *Orion* court, the lower court has implicitly determined that principles of the public trust doctrine preclude a "takings claim in its entirety." No analysis of whether the "property, burdened by the trust, is functionally and economically adaptable to some present, possible and reasonably profitable use," 747 P.2d at 1073, is necessary in South Carolina before the presence of the public trust absolves the state of the duty to compensate for a regulatory taking.

Unlike *Palm Beach Isles*, the decision below allows the government to avoid compensating for draconian regulatory actions without showing that such actions were designed to enforce "background principles" restrictions emanating from the public trust doctrine. Thus, the government may rely on the public trust as a post hoc justification for depriving a landowner of all economically beneficial use of property without just compensation. The Court should grant the petition to reconcile the important conflicts between the decision below and the decisions of other lower courts on the role of "background principles" restrictions, including the public trust doctrine, in limiting a right to compensation.

B. The Court Must Police the "Background Principles" Inquiry to Ensure That the Right to Just Compensation Does Not Wither in the States

Absent meaningful oversight by this Court, the "background principles" inquiry threatens to eviscerate the federal right to just compensation in South Carolina and other states. This threat arises mainly from the courts' tendency to view the inquiry as a vehicle for identifying "exceptions" to takings liability rather than for identifying property interests.

See McQueen v. South Carolina Coastal Council, 580 S.E.2d 116, 119 (S.C. 2003) (characterizing the "background principles" issue as whether "background principles of South Carolina property law *absolve* the State from compensating McQueen.") (emphasis added). Compounding the threat is the fact that "background principles" may arise from the general "law of property," as well as from the more clearly understood law of nuisance. *See Lucas*, 505 U.S. at 1029. Together, these "background principles" traits invite states to identify a wide variety of land use restrictions as takings exceptions, and thus escape "limits to the noncompensable exercise of the police power." *Id.* at 1026. *See, e.g., Hunziker v. State*, 519 N.W.2d 367 (Iowa 1994) (state law prohibition on development of lands containing native American burial grounds held to be a background principle defeating a compensation claim); *Machipongo Land and Coal Co., Inc. v. Commonwealth.* 799 A.2d 751 (Pa. 2002). (In light of changing notions of nuisance law, regulatory prohibition on mining in traditional mining area constituted exception to duty to compensate.); *Stevens v. City of Cannon Beach*, 854 P.2d 449, 456 (Or. 1993), *cert. denied*, 510 U.S. 1207 (1994) (discovering customary background principle that allows state to take landowner's right to exclude without just compensation).

The potential for avoiding federal takings liability under "background principles" "exceptions" recreates the situation that prevailed on the eve of *Lucas*. Then, the South Carolina Supreme Court advanced an expansive understanding of a "police power" exception which allowed the states to deny compensation for land use regulation whenever the goal was to stop a "public harm." *Lucas*, 505 U.S. at 1020-26. This Court rejected this understanding precisely because it was so broad and malleable that it threatened to swallow the federal right to just compensation completely. *Id.* at 1026. By signaling a similar willingness to review misapplications of the "background principles" inquiry, this Court can contain the

danger those misapplications present to constitutionally-protected property rights. *See generally*, David L. Callies & J. David Breemer, *Selected Legal and Policy Trends in Takings Law: Background Principles, Custom and Public Trust "Exceptions" and the (Mis)Use of Investment-Backed Expectations*, 36 Val. U. L. Rev. 339, 375-79 (2002) (arguing that Supreme Court jurisprudence hinders the expansive application of the public trust doctrine to deny property rights).

Yet, so far this Court has avoided "background principles" disputes, perhaps because they may appear to implicate questions of state law, rather than federal constitutional rights. This case presents the federal takings issue arising from the public trust doctrine more cleanly than the rejected cases. The central issue here is the propriety of the lower court's recognition of the public trust doctrine as a per se "background principles" exception to the normal, factually-intensive, takings inquiry and ultimately, to the duty to compensate for total takings; it is not the propriety of the court's application of the state's public trust doctrine to McQueen's property.

To abdicate control of the "background principles" inquiry to the states under these circumstances risks returning to them the ability to "nullify *Mahon's* affirmation of limits to the noncompensable exercise of the police power." *Lucas*, 505 U.S. at 1026. This Court denied such an ability over a decade ago when dressed up in the garb of "noxious use;" there is no reason to accede to it when dressed up in the garb of "background principle," whether state-law oriented or not. Indeed, it makes no sense to deprive the states of a vague, but federally reviewable "police power" takings exception only to give them a "background principles" concept that justifies new exceptions escaping this Court's review simply because they are said to arise from specific state rules.

The recent stream of cert petitions raising questions about the role of the public trust doctrine in regulatory takings law

demonstrates that this issue has percolated long enough in the lower courts. The lower court's adoption of a categorical public trust doctrine exception to a total regulatory taking presents the issue starkly and cleanly. Consequently, this case offers a perfect opportunity for this Court to give guidance on the important public trust doctrine takings question. More specifically, it presents an opportunity to remind the states that, when it comes to regulatory takings analysis, the general rule against adopting per se standards applies when the standard arises from the government's position, as well as when it is advanced by the landowner. *Tahoe-Sierra*, 535 U.S. at 321 (emphasis added).

CONCLUSION

For the foregoing reasons, the Court should grant the Petition for Writ of Certiorari.

DATED: August, 2003.

Respectfully submitted,

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